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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 838

ANTHONY BUCCIFERRO,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

ANTHONY BUCCIFERRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Anthony Bucciferro, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on June 16, 1959, but is not reported. The sentence committed the petitioner to the custody of the Attorney General for imprisonment for a period of one year and one day on two counts charging, respectively, the passing of counterfeit money, and the possession of counterfeit money. The record of the trial Court proceedings was transmitted to the Court of Appeals and an abstract of the record and a stenographic transcript of the proceedings was attached to the Brief in the Court of Appeals as an Appendix.

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the said judgment was filed February 4, 1960, and a Petition for Rehearing of the cause was denied on March 8, 1960. The Opinion of the United States Court of Appeals for the Seventh Circuit is published at 274 F. 2d 540 and is set forth in the Appendix to this Petition, with the judgment and orders of the Court of Appeals.

JURISDICTION.

On March 8, 1960, it was ordered that the Petition for Rehearing be denied. (The orders and judgment of the Court of Appeals appear in the Appendix). This Petition was filed within thirty days of the denial of Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. In a prosecution for possessing and passing a specific counterfeit One Hundred Dollar Note, where the evidence fails to show that a defendant touched, handled or had any opportunity to examine the Note, can his conviction rest upon proof of circumstances and oral statements indicating his substantial doubt concerning the validity of the Note in question, and upon proof that the defendant partook in the transfer of a separate One Hundred Dollar Note, which, although introduced into evidence, was not proved to be counterfeit?

2. Where the motion of a defendant for election between Counts 1 and Counts 2 and 3 was granted, may the trial Court and the prosecutor nullify the effect of the election and admit as a similar offense, evidence concerning Count 1, which evidence is insufficient to establish a crime because of failure to prove that the Note involved in Count 1 was counterfeit? And has not such defendant been denied due process by conviction of a charge not made and upon evidence insufficient to establish a crime?

3. Where the evidence offered by the Government on Counts 2 and 3 was circumstantial and consistent with innocence, and the Government offered and relied upon evidence of a separate offense charged in Count 1 of the indictment, but not on trial by the prosecutor's election, and where the evidence concerning the offense charged in Count 1 falls short of proving a crime, because there was no showing that the Note involved in that Count was counterfeit, has not the trial Judge received evidence upon an erroneous theory, and has not the Court of Appeals erred in approving the admission and consideration of evidence on an erroneous theory, and was not the defendant thereby deprived of a fair trial?

4. Does Section 472, Title 18, U.S.C., forbidding possessing and passing of counterfeit currency with intent to defraud, require that whoever passes or transfers currency must know that it is genuine? Or is it the burden of the Government to prove that the defendant knew it to be counterfeit?

STATEMENT OF THE CASE.

The petitioner was convicted on two counts for violation of Section 472 of Title 18, U.S.C., which reads as follows:

> "§ 472. Uttering counterfeit obligations or securities
>
> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705."

The indictment herein was in four counts and named two defendants. Count 1 charged the petitioner, Anthony Bucciferro, and Michael Lee Ricciardi, who pleaded guilty on the eve of trial and testified for the Government, with knowingly, wilfully and feloniously and with intent to defraud, keeping in their possession and concealing *one* falsely made, forged and counterfeit obligation, thereafter described with the Serial Number quoted as "Serial Number G 42437808 A". The offense was charged as having occurred on or about January 10, 1959, at Chicago, in the Northern District of Illinois. (App. 2)

Count 2 charged the identical offense except that possession and concealment of a different bill by the two defendants was alleged. This bill bore the "Serial Number G 42437828 A". (App. 3)

Count 3 charged the same two defendants with the offense of knowingly, wilfully and feloniously and with intent to defraud, uttering and passing as true, the same forged and counterfeited obligation of the United States, that is, the one bearing "Serial Number G 42437828A" and charged that it was passed to and upon the District Warehouse at 4501 South Pulaski Road, Chicago, Illinois, on January 10, 1959. (App. 3)

Count 4 did not name the petitioner, Bucciferro, and charged that on January 15, 1959, the defendant, Ricciardi, alone, did keep and conceal Four Hundred and Forty-Six (446) falsely made, forged, and counterfeited obligations, and charging that many of these bore different Serial Numbers. (App. 4)

The circumstances in this case are quite unusual, in that, all of the unfortunate implication of connection of the petitioner, Bucciferro, occurred on January 10, 1959. This was a Saturday, the only day of the week other than Sunday, upon which the petitioner did not engage in his regular employment as a truck driver. The case is further unusual in facts in that upon query concerning his association in the events of Saturday, January 10, 1959, the petitioner promptly and forthrightly stated his connection with the events and the contraband involved in the counts in which he was charged, and promptly and forthrightly agreed to assist the Secret Service Agents in the apprehension of the person who had afforded him the temptation which led to his prosecution, and the seizure of Four Hundred and Forty-Six (446) counterfeit One Hundred Dollar notes in the possession of that person, with whom he was later indicted, Michael Ricciardi. (App. 25-28)

The petitioner, Bucciferro, entered a plea of not guilty as to the three Counts in which he was named and the

only pertinent motion prior to the trial was his motion for election between Counts 1, 2 and 3, which motion was granted, and he proceeded to trial, without a jury, on May 4, 1959, on Counts 2 and 3. The defendant, Ricciardi, pleaded guilty to all four Counts of the indictment before the trial commenced. (App. 5, 6)

Briefly stated, the evidence showed that the petitioner met his co-defendant, Ricciardi, on the morning of Saturday, January 10, 1959, and that Ricciardi displayed a number of One Hundred Dollar notes without explaining where he had obtained them. (App. 9)

The Government's witnesses and the petitioner described events and conversation in the MBC Grill in Cicero, Illinois, owned by Ricciardi's aunt, which events and conversations cast very substantial doubt upon the validity or genuineness of these One Hundred Dollar notes. The judgment of several persons of unknown qualification was requested by the two defendants and some of these advisers thought the notes were good and some thought they were bad. Prior to this Saturday, Ricciardi had negotiated or caused the negotiation of purchases on two occasions with what he said were similar notes obtained by him from the same source, his former wife. To the date of his meeting with the petitioner, he had received no complaints concerning these two One Hundred Dollar notes and, so far as the record is concerned, there never was any complaint, and it is reasonable to assume that these two notes were genuine. (App. 19)

Suffering from the fears and doubts engendered by their conversations with bystanders and advisers regarding the genuineness of Ricciardi's notes, the petitioner and his co-defendant, Ricciardi, consulted a Chicago police officer concerning the validity of the notes and the possibility of

cashing them. This police officer, who testified for the Government, admittedly called another officer for his judgment and a comparison between one of Ricciardi's notes and a note produced by the first police officer was made. The officers assured the two defendants that the notes were genuine, or appeared to be, but declined to assist Bucciferro and Ricciardi in cashing them, and advised that they present them in stores where purchases of clothes and appliances costing substantial amounts made big bills not infrequent. (App. 20-22)

The two defendants acted upon this suggestion and advice and, almost immediately, presented one to an appliance store in the neighborhood of the Midway Air Port where the conversation with the police officers had occurred. The note there presented was suspected and the defendants departed without the radio which they had sought to purchase after giving a false name for Ricciardi as purchaser. (App. 23)

It was testified that the petitioner suggested a false name and address for Ricciardi's use at the appliance store. (App. 13)

While the petitioner was present when Ricciardi presented a One Hundred Dollar note to the clerk at the appliance store in payment of the proposed purchase of a radio, the evidence does not indicate that he ever handled or touched this note which is Government Exhibit 4 and is the note described in Counts 2 and 3 of the indictment upon which the petitioner was tried and convicted. (App. 23, 34)

The evidence shows that on Thursday, following these transactions, all of which occurred on Saturday, January 10, 1959, the petitioner was arrested and voluntarily cooperated with the Secret Service in the immediate appre-

hension of his co-defendant and in the capture of Four Hundred and Forty-Six (446) One Hundred Dollar notes which were in Ricciardi's possession and places of concealment.

The petitioner is 27 years of age, and his only education consists of finishing sixth grade in grammar school. He is a regularly employed truck driver and all of the events in which he is concerned took place on Saturday, which is the only day of the week, except Sunday, in which he is not regularly engaged in his employment. (App. 35)

The petitioner took the stand in his own behalf and denied that he knew that any note was counterfeit prior to the refusal by the District Warehouse appliance store to accept it, although he admitted that he strongly suspected the genuineness of the notes in Ricciardi's possession prior to assurance by the police officers whom he and Ricciardi consulted. (App. 31)

The petitioner's only connection with the notes was through Ricciardi and Ricciardi was proved to have obtained the notes from his ex-wife, and no further tracing of the source of the notes was established. (App. 15)

Agents of the Secret Service contended that they had obtained admissions of knowledge from the petitioner but admitted that these oral admissions were not recorded or made any part of any case report and were only imparted to the prosecutor upon the eve of trial, although they knew from the petitioner's attorney that Bucciferro denied prior knowledge of the counterfeit nature of the note which he was accused of possessing and cashing. (App. 26, 29)

Although the Government elected not to try Count 1 and caused it to be dismissed at the end of the trial by

motion, all of the evidence pertinent thereto other than proof that the note involved therein was counterfeit, was presented by the Government and admitted and considered by the Court. This included the admission of Government Exhibit 3 which bore the numbers described in Count 1. (App. 21)

No evidence was offered to establish that this note was counterfeit although it was testified that the police officer who told these boys that the notes were all right had obtained this note, Exhibit 3, from Ricciardi and the petitioner and turned it over to the Secret Service Agents who presented it in Court. (App. 21) However, the prosecutor made no effort to prove that this note, Exhibit 3, was, in fact, counterfeit, and the only proof offered concerning the invalidity or counterfeit nature of any note mentioned in the evidence, was the testimony of Secret Service Agent Peyton who testified that Government Exhibit 4, involved in Counts 2 and 3, was, in fact, counterfeit.

The Court overruled the motion for acquittal at the close of all evidence and sentenced the petitioner to the custody of the Attorney General for imprisonment for a period of one year and one day, and imposed a like sentence of one year and one day upon Ricciardi who was apprehended with Four Hundred and Forty-Six (446) notes through the cooperation of the petitioner. (App. 41)

Pertinent parts of the record, including the indictment, motion for election, judgment order, and an abstract of the stenographic transcript of evidence were printed for the use of the Court of Appeals as an Appendix to the Brief in accordance with the Rules of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING WRIT.

The importance of this case lies in the fact that it presents a question of Federal law involving criminal trials, which should be settled by this Court, that is, whether evidence admittedly circumstantial on the question of knowledge and intent to commit the offenses charged and of doubtful sufficiency to support conviction can be bolstered by the admission of evidence of a presumably similar offense, not on trial, but the proof of which fell short of establishing criminality, under the erroneous theory that it was proof of another similar offense. It is submitted that where this happens, as it did below, it constitutes a "sheer denial of due process" in that it constitutes conviction upon a charge not pending in the trial, and conviction and punishment without evidence of guilt, *Thompson* v. *City of Louisville*, S. Ct. No. 59, October Term 1959, decided March 21, 1960.

The Court of Appeals below has decided a federal question involving the admissibility and consideration of evidence of similar offenses in a manner which is contrary to applicable decisions of other Circuit Courts of Appeals. *Gart* v. *United States*, C.A. 8, 294 F. 66, 67; *Paris* v. *United States*, C.A. 8, 260 F. 529, 531; *Fabacher* v. *United States*, C.A. 5, 20 F. 2d 736, 738; *Henderson* v. *United States*, C.A. 9, 143 F. 2d 681, 683.

The Court of Appeals in the case at bar has sanctioned the use of proof of suspicious circumstances which fall short of a proved offense as evidence of knowledge and intent, and has sanctioned the conviction and punishment of the petitioner on the erroneous theory that the circumstantial proof of the offenses brought to trial was sufficiently bolstered to support conviction by the admission, under an erroneous theory, of the evidence of suspicious circumstances relating to a Count not on trial.

I.

The petitioner respectfully suggests that the trial Court below, having granted the motion for election made by petitioner, and the Government having elected not to try Count 1 of the indictment, fell into error with the prosecutor in assuming that the suspicions aroused by the evidence concerning Counts 2 and 3 could be bolstered by the evidence which likewise merely gave rise to suspicion that the crime charged in Count 1 had occurred.

It is amazing that the prosecutor, in undertaking to cause the punishment of the petitioner should carefully abstain from making proof of the counterfeit nature of any other note than Exhibit 4, the one transmitted by Ricciardi, the co-defendant, in the petitioner's presence to the clerk in the appliance store; if the note was indeed, counterfeit.

It is submitted that had the prosecutor merely proved the preliminary conversation and events which should and did give rise to alarm and suspicion on the part of the petitioner and his co-defendant concerning the genuineness of the co-defendant's money, and had then proved the passing of the note in the petitioner's presence, the trial Judge might have found the petitioner guilty, although the petitioner respectfully submits that the total of all of the conjectural and contrary evidence consisting of casual opinions about the validity of the notes gave rise to no more than suspicion and could not support knowledge on the petitioner's part that the notes were counterfeit. This would present a mere question of sufficiency of evidence probably not meriting certiorari.

However, the prosecutor, having elected not to proceed on Count 1 at the time of petitioner's motion for election, nevertheless chose to attempt to prove Count 1 as

a similar offense. Petitioner submits that when the prosecutor thus elected to prove Count 1 as a similar offense to those charged in Counts 2 and 3, it became incumbent upon him to present proof of the commission of such offense in a clear and convincing manner. He could not rest with regard to this similar offense with mere proof of a suspicious circumstance short of showing or indicating that it involved criminality and could not use circumstances and events which might give rise to the suspicion that the petitioner was criminally guilty in the pretended transaction testified about. *Gart* v. *United States*, C.A. 8, 294 F. 66, 67; *Paris* v. *United States*, C.A. 8, [redacted]F. 529, 531; *Fabacher* v. *United States*, C.A. 5, 20 F. 2d 736, 738; *Henderson* v. *United States*, C.A. 9, 143 F. 2d 681, 683.

The trial Judge below did not make findings of fact, and neither side requested them. Thus, it is impossible to determine whether he would have found the circumstances in evidence concerning the events charged in Counts 2 and 3 sufficient to overcome reasonable doubt from the presumption of innocence, without the evidence relating to Count 1 which was offered by the prosecution and admitted by the trial Court. Certainly, this evidence was prejudicial and left a grave suspicion that Exhibit 3 involved in the proof concerning the Count 1 transaction, was counterfeit. However, for all that the record in the case at bar shows, Exhibit 3 may well be a valid One Hundred Dollar note. It was delivered to the Secret Service by the police officer who had given an opinion that some of Ricciardi's notes were genuine. No Secret Service officer or other witness testified that Exhibit 3 was counterfeit. Thus, criminality under Count 1 on the theory of similar offense, was not established, but more

grave suspicion was cast into the scale against the petitioner.

It is obvious that the trial Court below and the Court of Appeals below applied an erroneous theory to the reception of this "similar offense" evidence. Conviction in this case cannot be justified on the theory that without the "similar offense" Count 1 evidence, conviction could have been sustained. The fact is that the "similar offense" evidence was received, and was considered, and did undoubtedly serve the prosecutor's purpose in inducing conviction.

In a case where there was trial without a jury, the Court of Appeals for the Ninth Circuit rendered an opinion in reversing and remanding in which it compared mere errors of law relating to specific admissions of evidence in non-jury cases and admissions of evidence mere basic misconception of essential elements. *Wilson* v. *United States*, 250 F. 2d 312 at pages 324 and 325. Among other things, that Court of Appeals asked "Is there any difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and in effect instructing himself similarly in a non-jury case?" (P. 324), and at page 325, the Ninth Circuit Court of Appeals, in the *Wilson* decision, said:

> "The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. *Pearson* v. *United States*, 6 Cir., 192 F. 2d 681; *People* v. *Bigley*, 178 Misc. 552, 35 N.Y.S. 2d 130; *People* v. *Hewlett*, 108 Cal. App.2d 258, 239 P.2d 150, 159; C.J.S. Criminal Law § 1834, p. 676.
>
> "It does not matter whether or not guilt is a close question. The accused is entitled in any case to be

tried under proper legal criteria. But the significance of this matter is all the more accentuated in a factual context where the question is a close one."

The petitioner contends that the trial Court below could not have submitted the evidence on "similar offense" to a jury because it fell short of proved criminality.

As this case was tried and considered by the Court of Appeals, 274 F. 2d 540 at page 542, the petitioner was, of course, convicted by use of evidence offered in support of the "similar offense" theory insofar as the Count 1 transaction was concerned. In recent decisions this Court has condemned conviction on charges not made. *Stirone* v. *United States*, 80 S. Ct. 270, 274; and against conviction on charges made but not duly proved. *Thompson* v. *City of Louisville*, S. Ct. No. 59, October Term 1959, decided March 21, 1960. Here the charge, though made, was not on trial by election of the prosecutor.

It is respectfully suggested that adherence to proper methods of conviction should not be dispensed with. Failure to so adhere should not be tolerated.

In the case at bar, there is proof of the counterfeit nature of one note, and one note only. The evidence that Ricciardi had negotiated two One Hundred Dollar notes before the fateful Saturday upon which he met the petitioner, with no proof that these were counterfeit; and the possession by the Secret Service of Exhibit 3 given them by police officer Finocchio, who advised the petitioner and his co-defendant that the bills he saw were good, and its presentation in evidence as part of the Government's case without proof that it was counterfeit, leaves this record in a condition where mere con-

jecture that these three notes are counterfeit, supports this erroneous trial method and erroneous theory of admission of evidence.

II.

It is respectfully submitted that the case of this insignificant and undistinguished truck driver, without experience in currency of large denominations, and with only a sixth grade education, presents squarely the question as to the meaning of the prohibitory statute on which the prosecution was based and its impact upon those governed by it, and its impact upon the free transfer of our currency.

Knowledge of the counterfeit nature of the currency involved in a prosecution brought under Section 472, Title 18, U.S.C., is an essential of the offense. *United States* v. *Carll*, 105 U.S. 611, 613; *United States* v. *Ruffino*, C.A. 2, 67 F. 2d 440, 441; *United States* v. *Litberg*, C.A. 7, 175 F. 2d 20, 21, 22.

Thus, it is suggested, that Section 472 of Title 18 does not place upon those governed by it the burden of *knowing* that currency is good before it is transferred, but the burden is upon the Government to prove knowledge that it is counterfeit. If it were necessary to *know* that a bill was good before one could transfer it, ready flow of currency would be substantially hampered by necessary examinations.

It is submitted that in the case at bar, suspicion has been substituted for proof of knowledge. Mere suspicion, however robust, will not support conviction and punishment. *United States* v. *Wainer*, C.A. 7, 170 F. 2d 602, 606.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—JANUARY SESSION, 1960

No. 12756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTHONY BUCCIFERRO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 4, 1960

Before HASTINGS, *Chief Judge*, CASTLE, *Circuit Judge* and SWYGERT, *District Judge*.

CASTLE, *Circuit Judge*. Anthony Bucciferro, defendant-appellant, was indicted in a four-count indictment along with one Ricciardi. Bucciferro, hereinafter referred to as defendant, was named in the first three counts and Ricciardi in all four. Count 1 charged the possessing and concealing of a counterfeit One Hundred Dollar note with knowledge that it was counterfeit and with intent to defraud. Count 2 charged the same offense with respect to a different One Hundred Dollar note. Count 3 charged the uttering and passing as true and genuine the counterfeit note described in Count 2. Count 4, which did not name defendant, charged Ricciardi with possessing and concealing 446 counterfeit One Hundred Dollar notes, knowingly

and with intent to defraud. All counts charged violation of 18 U.S.C.A. §472.

Prior to the trial of defendant Ricciardi pleaded guilty to all four counts. Defendant's motion that the Government be required to elect between Count 1 and Counts 2 and 3 was granted and he was tried on Counts 2 and 3 only. He was convicted on each of said counts.

Defendant appealed and contends that the District Court erred in overruling his motion for acquittal at the close of the evidence and in admitting testimony concerning the One Hundred Dollar note described in Count 1 of the indictment, which he argues had the effect of nullifying the election which had been required of the Government.

The contested issues are (1) whether the evidence viewed in a light most favorable to the Government sustains the judgment, and (2) whether the Government persisted in the trial of Count 1, to support conviction on Counts 2 and 3, in nullification of the election it had been required to make.

Defendant's contention that the District Court erred in not granting his motion for acquittal is bottomed on the assertion that the defendant did not have specific knowledge of the counterfeit nature of the One Hundred Dollar note involved under Counts 2 and 3 of the indictment. In resolving this question we must view the evidence in the light most favorable to the Government. *United States* v. *Detente*, 7 Cir., 199 F. 2d 286; *United States* v. *Kelley*, 7 Cir., 186 F. 2d 598.

On January 10, 1959, Ricciardi, the co-defendant in this case, was in a restaurant owned by his aunt, Lena Charles. There he met the defendant Bucciferro, and in the presence of Lena Charles, a Mrs. Walker and the defendant he displayed several One Hundred Dollar notes. Lena Charles told Ricciardi the money was fake. Mrs. Walker testified that while Ricciardi was displaying the notes the defendant said they did not look real. She further testified that the defendant took one of the One Hundred

Dollar notes to his sister and she said it was not real and she showed him a real One Hundred Dollar bill.

The following testimony of Ricciardi also establishes knowledge on the part of Bucciferro that the bills were counterfeit:

> "A. I said to him that I had counterfeit bills. Then he said, 'Let me see them.' And I showed them to him.
>
> Q. How many did you show him, do you know?
>
> A. I can't recall. It was a few of them. He says, 'Well, let me take one. I might know somebody that would like it.'
>
> Q. And what did you say?
>
> A. I says, 'All right.'"

The defendant further suggested that they cash one of the notes at the Airport, and that Ricciardi give an assumed name. They then drove to the Municipal Airport but Ricciardi got scared and walked out of the airline terminal without cashing the note.

Later defendant suggested cashing a One Hundred Dollar bill by making a purchase at an appliance store. On the way to the appliance store the defendant suggested the approach to be made in cashing the hundred dollar note; again suggesting use of an assumed name.

A witness, Mildred Rehnberg, testified that the defendant was present with Ricciardi at the appliance store (sometimes called District Warehouse) when the counterfeit note involved in Counts 2 and 3 was passed.

We find that the evidence sufficiently shows the defendant was guilty of knowingly possessing, uttering and passing the counterfeit note.

The defendant was not tried on Count 1. There was testimony relating to events which took place on the same day with respect to the note described in Count 1. Witness Finocchio testified that the defendant exhibited the bill to him stating "it is queer" and inquired if he wanted

to buy One Hundred Dollar bills at $10.00 a hundred. He left a bill with Finocchio as a sample. This evidence was admissible. In *United States* v. *Crowe*, 7 Cir., 188 F. 2d 209, 212-213 we stated:

> "Evidence of another crime is admissible where the other offense is logically connected with that charged, or where the acts are so closely and inextricably mixed up with the history of the guilty act itself as to form part of the plan or system of criminal action. *United States* v. *Tuffanelli*, 7 Cir., 131 F. 2d 890. Evidence of another crime is admissible where it was committed as part of the same transaction and forms part of the *res gestae*. *Gianotos* v. *United States*, 9 Cir., 104 F. 2d 929."

The introduction of this evidence did not constitute a nullification of the Government's election. Defendant's contentions in this respect are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, February 4, 1960

Hon. John S. Hastings, Chief Judge

Hon. Latham Castle, Circuit Judge

Hon. Luther M. Swygert, District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ANTHONY BUCCIFERRO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12756

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, March 8, 1960

Hon. John S. Hastings, Chief Judge

Hon. Latham Castle, Circuit Judge

Hon. Luther M. Swygert, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 12756 v.

ANTHONY BUCCIFERRO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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JAMES R. BROWNING, Clerk

No. 926

In the Supreme Court of the United States

OCTOBER TERM, 1959

ANTHONY BUCCIERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 838

ANTHONY BUCCIFERRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4) is reported at 274 F. 2d 540.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1960 (Pet. App. 5). A petition for rehearing was denied on March 8, 1960 (Pet. App. 6). The petition for a writ of certiorari was filed on April 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for illegally possessing and passing a counterfeit $100 note, the court properly

permitted evidence as to possession of another note on the same date to show petitioner's intent and plan to pass counterfeit notes.

2. Whether the prosecution sustained its burden of proving petitioner's knowledge that the note was counterfeit.

STATUTE INVOLVED

18 U.S.C. 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

Petitioner and a codefendant, Ricciardi, were charged with violations of 18 U.S.C. 472, *supra*, in an indictment returned in the United States District Court for the Northern District of Illinois. Count 1 charged both defendants with possessing and concealing a counterfeit $100 note, count 2 charged the same offense with respect to a different $100 note, and count 3 charged the passing as genuine of the note described in count 2 (App. 2–4).[1] Count 4 charged Ricciardi with possessing and concealing 446 counterfeit $100 notes (App. 4–5). Ricciardi pleaded guilty and testified for the government (App. 7, 11).

[1] "App." refers to the appendix to petitioner's brief in the court of appeals which has been filed in this Court.

Petitioner filed a motion to require an election between counts 1 and 2, and the government elected to proceed on counts 2 and 3 only (App. 6, 7). In a non-jury trial, the court found petitioner guilty on counts 2 and 3, and sentenced him to imprisonment for one year and one day (App. 8, 41, 42). On appeal (App. 43–44), the conviction was affirmed (Pet. App. 5).

Pertinent evidence adduced at the trial may be summarized as follows:

On January 10, 1959, petitioner, Ricciardi, Mrs. Walker, and Ricciardi's aunt, Lena Charles, were in a restaurant owned by Mrs. Charles. Ricciardi displayed about ten $100 bills to the other three, stated that they were counterfeit, and announced that he was going to sell them for $30 per bill. Lena Charles told Ricciardi that his uncle had said that a $100 bill previously received from Ricciardi was "fake or phony," and petitioner inquired if she would like fifty thousand dollars worth (App. 9, 10, 12). Petitioner observed that the bills shown by Ricciardi did not look like real money, but he asked to take one since he might know someone who would like it (App. 10, 12). After Ricciardi gave him a bill, petitioner and Mrs. Walker showed it to petitioner's sister, who said that it was not real and to give it back (App. 10, 38).

Petitioner suggested that Ricciardi cash one of the bills by purchasing an airplane ticket under an assumed name at Midway Airport. Ricciardi ordered a ticket, but was scared and walked out without cashing the bill (App. 12). Petitioner and Ricciardi then talked to police officer Finocchio in his squad car at

the airport. In showing one of the $100 bills, petitioner said, "How do you like this, it is queer" (App. 20). Finocchio stated that the bill looked good when he compared it with a $100 bill which he had (App. 22, 13). Petitioner made an appointment (which he did not keep) to meet Finocchio at a later date for the sale of $100 bills at $10 per $100, and gave Finocchio as a sample a $100 bill which he had obtained from Ricciardi (App. 20). Finocchio later that evening turned over this bill (Gov. Ex. 3, designated in count 1) to agent Peyton of the Secret Service. It was admitted in evidence over objection that it was not involved in any count on trial and did not tend to prove any issue in the case (App. 21).

Later the same day (January 10, 1959), upon petitioner's suggestion that Ricciardi purchase a portable radio under an assumed name, the two men went to an appliance store. Both were present when Ricciardi gave the sales clerk a $100 bill (Gov. Ex. 4, designated in counts 2 and 3) to be cashed. Petitioner left the store first and Ricciardi also left after the proprietor became suspicious of the bill and tried to contact the police (App. 13, 23–24). Government Exhibit 4, which the proprietor had turned over to Secret Service, was admitted in evidence over the objection that it was not shown that petitioner had examined or handled the bill (App. 23).

After petitioner's arrest, on January 15, 1959, he arranged for a Secret Service agent, posing as a truck driver, to purchase some counterfeit bills from Ricciardi. When Ricciardi was arrested he had in his home the 446 bills mentioned in count 4 (App. 17,

25–27). Agent Weinstein testified that, shortly after Ricciardi's arrest, petitioner admitted that he had known before he started his venture that the bills were counterfeit (App. 25). On January 27, 1959, in reply to a remark by agent Peyton that when Ricciardi and petitioner left the restaurant he knew the bills were counterfeit, petitioner answered, "Sure, I did" (App. 28–29). On another occasion a few days before the trial, petitioner, in the presence of Ricciardi's aunt and uncle, told Ricciardi, who stated his intention of pleading guilty, that if they both (petitioner and Ricciardi) claimed that they did not know the bills were counterfeit, they could get around the police officer's statement (App. 14).

Petitioner, testifying on his own behalf, denied previous knowledge that the bills were counterfeit (App. 36). He admitted that Ricciardi offered to pay petitioner $20 for each $100 bill which petitioner cashed (App. 32–33, 37).

ARGUMENT

1. The court did not err in permitting the introduction in evidence of the counterfeit $100 bill (Gov. Ex. 3) which was named in count 1 of the indictment. Petitioner left the bill with officer Finocchio as a sample for an intended future sale, just before he and his codefendant passed at the appliance store the bill (Gov. Ex. 4) involved in counts 2 and 3. The testimony was relevant to show petitioner's plan to pass counterfeit bills, and was admissible on the issue of intent to defraud. Cf. *Weiss* v. *United States*, 122 F.

2d 675, 682 (C.A. 5), certiorari denied, 314 U.S. 687; *United States* v. *Crowe*, 188 F. 2d 209, 212 (C.A. 7).

Cases cited by petitioner as being in conflict with the decision below (see Pet. 10, 12) hold that proof of the similar offense going to the issue of intent must be clear and convincing, and not predicated upon mere suspicion. That standard was met in the instant case. Although there was no direct testimony that Government Exhibit 3 was a counterfeit bill, there was sufficient circumstantial evidence from which the judge as trier of the facts could draw the reasonable inference that it was.[2] It was one of a number of counterfeit $100 bills, which petitioner and Ricciardi were intent upon passing on the same date and from which Government Exhibit 4 (the counterfeit bill involved in counts 2 and 3) was taken. Since petitioner made an appointment with officer Finocchio for the later sale of $100 bills at $10 per $100 and gave him Government Exhibit 3 as a sample, Finocchio could reasonably believe that the bill was counterfeit, and accordingly turned it in to the Secret Service (App. 20, 21). It is significant, moreover, that in his own testimony petitioner related that he and Ricciardi had talked to the officer about the sale of money (App. 32), and petitioner admitted that he had left the bill with the officer (App. 35).

Proof of a similar offense was not, as petitioner contends, tantamount to a conviction under count 1. Evidence as to this similar offense would have been

[2] When petitioner objected to the admissibility of Government Exhibit 3, he did not assign as a reason the alleged failure to prove that it was a counterfeit bill (App. 21).

admissible even if there had never been a count 1 designating the counterfeit bill. The conviction and sentence were on counts 2 and 3 alone (App. 8, 42).

2. We agree with petitioner (see Pet. 15) that the burden of proof was upon the government to show his knowledge that the $100 note was counterfeit—and not upon him to prove knowledge that the currency was good. The government, however, amply sustained its burden. The evidence showed that Ricciardi told petitioner that the bills were counterfeit and that petitioner himself admitted after his arrest that he knew this fact. This and the other evidence of petitioner's activities (see *supra*, pp. 3–5) was clearly sufficient to justify the finding that petitioner knew that the note involved in counts 2 and 3 was counterfeit. Cf. *United States* v. *Kelley*, 186 F. 2d 598 (C.A. 7), certiorari denied, 341 U.S. 954; *Marson* v. *United States*, 203 F. 2d 904 (C.A. 6); *Carrullo* v. *United States*, 184 F. 2d 743 (C.A. 8).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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